

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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OCEANA COUNTY BOARD OF ROAD  
COMMISSIONERS,

UNPUBLISHED  
December 11, 2001

Petitioner-Appellee,

v

DEPARTMENT OF ENVIRONMENTAL  
QUALITY,

No. 221673  
Oceana Circuit Court  
LC No. 99-000974-AA

Respondent-Appellant.

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Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Respondent appeals by leave granted from the circuit court's August 2, 1999, order granting petitioner's motion for peremptory reversal of respondent's decision denying petitioner's applications to replace existing bridges with culverts at two locations in Oceana County. We affirm.

In 1996, petitioner filed an application proposing to replace a bridge crossing the south branch of the Pentwater River at 136th Avenue in Elbridge Township in Oceana County. Petitioner later filed a separate application to replace the existing bridge crossing Carlton Creek at 92nd Avenue in Grant Township in Oceana County. After respondent denied both permit applications, petitioner contested the denials and a three-day administrative hearing followed.

Following the hearing, the administrative hearing referee entered his proposals for decision in January 1999. The proposals found, as a matter of fact based on the record, that neither the south branch of the Pentwater River nor Carlton Creek had ever been capable of floating logs, therefore, neither was navigable.<sup>1</sup> Also as a matter of fact, the proposals concluded that riparian rights, agriculture, commerce and industry, and wildlife would not be affected. Moreover, the proposals also found that installation of twin arch culverts would not materially

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<sup>1</sup> The test for determining the navigability of a stream is whether the waterway is capable of floating logs. *Bott v Natural Resources Comm*, 415 Mich 45, 60-61; 327 NW2d 838 (1982); *Moore v Sanborne*, 2 Mich 519, 526 (1853).

affect fish or fisheries. As a matter of law, the administrative hearing referee further concluded that because the streams were not navigable, they were not impressed with the public trust, and therefore the proposed project would not adversely impact the public trust. The administrative hearing referee also found that the proposed projects would not have an adverse impact on riparian rights, recreation, fish or wildlife, aesthetics, local government, commerce, or industry.

On February 11, 1999, respondent's attorney requested, by way of letter to the Acting Deputy Director of the Department of Environmental Quality (DEQ), that the Director of the DEQ render the final decision in each of the contested cases because of their policy significance. That request was granted, and on April 9, 1999, Director Russell J. Harding heard oral argument regarding objections to the proposed decision. In a decision entered April 15, 1999, Director Harding issued the agency's final determination and order. Specifically, Director Harding adopted petitioner's proposed findings of fact that neither stream was navigable, and neither proposed project affected riparian rights, agriculture, commerce or wildlife. Director Harding also concluded as a matter of law that because neither stream was navigable, they were not impressed with the public trust, and therefore the public trust was not adversely affected. Director Harding also concluded as a matter of law that riparian rights would not be adversely affected by the proposed projects. Director Harding went on to express his concerns that the proposed projects "would result in a significant adverse impact to the high quality fish and fish habitat present in the Carlton Creek and the south branch of the Pentwater River." Noting that clear span bridges provided a reasonable alternative to the installation of twin arch culverts, the Director denied petitioner's applications to install the culverts.

Petitioner subsequently petitioned for review in the Oceana Circuit Court on May 26, 1999, arguing that the DEQ did not have discretion to deny the permits where it expressly concluded that the proposed projects did not adversely affect riparian rights or the public trust. Petitioner subsequently moved for peremptory reversal on June 21, 1999. Respondent challenged petitioner's motion for peremptory reversal, arguing that petitioner's interpretation of MCL 324.30106 was flawed. The circuit court granted petitioner's motion for peremptory reversal in an order entered August 2, 1999. In a subsequent amended order entered August 30, 1999, the court included specific findings of fact and conclusions of law. Notably, the court found that neither stream was navigable, and that neither project would adversely affect riparian rights or the public trust. In the circuit court's view, the plain language of MCL 324.30106 required the DEQ to issue the requested permits where riparian rights and the public trust were not adversely affected. We granted respondent's application for leave to appeal in an order entered September 17, 1999.

In *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001), this Court recently set forth the applicable standard of review for claims arising from administrative proceedings.

"An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 354; 564 NW2d 519 (1997). Substantial evidence is any evidence that reasonable

minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. See *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). This Court's review of the circuit court's decision is limited to determining whether the circuit court 'applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.' *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In other words, this Court reviews the circuit court's decision for clear error. *Id.* A decision is clearly erroneous when, 'on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made.'" [*Barak, supra* at 597, quoting *Michigan Ed Ass'n Political Action Committee (MEAPAC) v Secretary of State*, 241 Mich App 432, 443-444; 616 NW2d 234 (2000).]

On appeal, respondent contends that the circuit court erred in its interpretation of § 30106 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, which governs the DEQ's issuance of permits regulating inland lakes and streams. MCL 324.30102 mandates that permits be acquired for certain activities concerning inland lakes and streams. MCL 324.30106 sets forth the procedure for granting a permit, and provides in pertinent part as follows:

The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state.

After reviewing the above statutory language, the circuit court determined that the DEQ was required to issue the requested permits where the department expressly found that neither proposed project would affect riparian rights or the public trust. On this record, we are not persuaded that the circuit court applied erroneous legal principles or grossly misapplied the substantial evidence test to the department's factual determinations. *Barak, supra* at 597. We may only reverse the circuit court's decision where we are left with a definite and firm conviction that the circuit court made a mistake. *Id.* In the instant case, we are not left with such a conviction.

Director Harding, in his decision entered April 15, 1999, concluded that riparian rights and the public trust were not adversely affected by the proposed projects. The circuit court found these factual determinations to be supported by competent, material, and substantial evidence on the whole record. Consequently, the circuit court determined that respondent was required to issue a permit according to the plain language of § 30106. On the record before us,

we are satisfied that the circuit court applied correct legal principles and that its decision was not clearly erroneous.

Affirmed.

/s/ Hilda R. Gage  
/s/ Kathleen Jansen  
/s/ Peter D. O'Connell